(3)

Supreme Court, U.S.
FILED
DEC 23 2004
OFFICE OF THE CLERK

No. 04-499

In The Supreme Court of the United States

JAE WON JEONG,

Petitioner,

v.

TAIHEIYO CEMENT CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Eight

REPLY TO BRIEF IN OPPOSITION

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
FLEISHMAN & FISHER
1875 Century Park East, Suite 2130
Los Angeles, CA 90067
(310) 557-1077

ELIZABETH J. CABRASER
BILL LANN LEE
MORRIS A. RATNER
SCOTT P. NEALEY
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery St., 30th Floor
San Francisco, CA 94111
(415) 956-1000

JULIAN G. KU
HOFSTRA UNIVERSITY SCHOOL OF LAW
Hempstead, NY 11549
(516) 463-4237

HAEWON SHIN
LAW OFFICES OF HAEWON SHIN
3435 Wilshire Blvd., Suite 2230
Los Angeles, CA 90010
(213) 385-3773

Counsel for Petitioner Jae Won Jeong
(Additional Counsel Listed On Signature Page)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Introduction	1
I. No Policy to Privilege Possible Diplomatic Negotiations with Third-Party Countries as Individuals' Exclusive Remedy is Expressed Unmistakably in the 1951 Treaty	1
II. The Decision Below Allows the Executive's Litigation Tactics to Vitiate State Laws	4
III. Earlier Cases Do Not Definitively Resolve the Important Issues Presented	5
IV. Taiheiyo's "Alternative Grounds" Are of No Merit	6
A. Political question	7
B. Due Process	8
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 7

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 9

Alperin v. Vatican Bank, 242 F. Supp. 2d 686 (N.D. Cal. 2003) 8

American Insurance Association v. Garamendi, 539 U.S. 396 (2003) ..... *passim*

Baker v. Carr, 369 U.S. 186 (1962) 7

Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) 7

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 3

Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003) 5, 6, 7

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 4, 5

Gerling Global Reinsurance Corp. of America v. Gallagher, 267 F.3d 1228 (11th Cir. 2001) 8

Hwang Geum Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003), *vacated*, 124 S. Ct. 2835 (2004) 6

Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) 7

Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986) 7

TABLE OF AUTHORITIES – Continued

Page

Kelberine v. Société Internationale, Etc., 363 F.2d 989 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 989 (1966) 8

Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991) 7

Mitsubishi Materials Corp. v. Superior Court (Dillman), 113 Cal. App. 4th 55, 6 Cal. Rptr. 3d 159 (2003) 6

Oetjen v. Central Leather Co., 246 U.S. 297 (1918) 7

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 9

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 8

The Paquete Habana, 175 U.S. 677 (1900) 8

CONSTITUTIONS

U.S. Const. art. II 4

U.S. Const. art. III 7

STATUTES

Cal. Civ. Proc. Code § 354.6 (West Supp. 2004) 3, 8

TREATIES

Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 ..... *passim*

INTRODUCTION

Taiheiyo fails to dispel the importance of the issues presented. The decision below is inconsistent with *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), because it preempts a State law on the basis of a treaty without showing that a preemptive national policy is "expressed unmistakably" in the treaty – here, that contingent diplomacy between Japan and non-signatory countries would be the *exclusive* remedy for individual labor and personal injury claims. The court below adopts a reading of *Garamendi* that threatens fundamental values of federalism by impinging too far on the powers of the States to fashion rights and remedies in their own courts in traditional areas of State interest.

I. No Policy to Privilege Possible Diplomatic Negotiations with Third-Party Countries as Individuals' Exclusive Remedy is Expressed Unmistakably in the 1951 Treaty.

Unable to address the essential inquiry posed by *Garamendi* – that for an international agreement to preempt a State law, the preemptive policy must be "expressed unmistakably" by the Federal Government, 539 U.S. at 421 – Taiheiyo argues that article 4(a) of the 1951 Treaty is "the antithesis of" or is "incompatibl[e]" with Mr. Jeong's state court action for unpaid wages and personal injuries. (Opp. at 17.) Taiheiyo thus seems to revert to the express preemption theory rejected by the Court of Appeal in its first opinion. (*See* App. 42 ("Nothing in . . . the 1951 Treaty expressly preempts or bars claims by Korean nationals against Japanese corporations for unpaid labor or personal injuries suffered for slave or forced labor during WW II.").)

Article 4(a)'s exhortation of Japan to enter into negotiations with countries not party to the 1951 Treaty – under which "neither Korea nor Japan was required to implement any specific resolution" nor Korea "to even negotiate with Japan" (App. 42-43) – by itself hardly is an unmistakable expression that future claims by non-party nationals would thereby be extinguished. Yet that bare treaty language is all that the Court of Appeal relied on and all that Taiheiyo can cite. Taiheiyo does not even claim that anything like the exclusivity language woven into the express policies of the executive agreement in *Garamendi* (*see* Pet. at 15-16) exists here.

Thus, while the *Garamendi* agreement did not have a preemption clause (*see* Opp. at 18 (quoting 539 U.S. at 417)), authoritative statements made in connection with the agreement were replete with references that the German Foundation's and ICHEIC's procedures would be the "exclusive" remedies. *See* 539 U.S. at 422. To safeguard the prerogatives of the States and preserve the interests of federalism, nothing short of such explicit statements suffices under *Garamendi* to preempt State laws. Taiheiyo does not even pretend that they are present here.

Taiheiyo also fails to refute Mr. Jeong's showing that the Government has expressed contradictory views on the policy embodied in the 1951 Treaty, further undermining its view and that of the court below. (*See* Pet. at 18-21.) Taiheiyo argues again that the Government's admission that Mr. Jeong could have sued in the United States if only he had done so earlier applies only to claims "under *federal* law." (Opp. at 21 (emphasis added).) Mr. Jeong has already demonstrated that the Government's statements make no distinction between state and federal claims, and, even if they did, they would still be inconsistent with

Taiheiyo's asserted reading of the Treaty that diplomatic resolution of claims is the *exclusive* remedy under the Treaty.

Since the Government has conceded that Mr. Jeong could have sued earlier, *before* the expiration of statutes of limitations, there can be no bar to his suing now under California's *extension* of the statute. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945) (Jackson, J.) (It is constitutional to "lift[ ] the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time"). At the least, the Government's concession weakens its and Taiheiyo's broad claims.

Taiheiyo excuses the Court of Appeal's failure to take into account California's traditional and powerful interest in administering limitation in its courts and providing a forum for its citizens (*see* Pet. at 25-28) by asserting that, in *Garamendi*, "the express federal policy and the clear conflict raised by the state statute [were] alone enough to require state law to yield," 539 U.S. at 425, *quoted in* Opp. at 22. But *Garamendi did* have an express policy and this case does not.

Taiheiyo makes no argument – nor can it make one – that the court below engaged in any true balancing. Rather, it seeks to cover over the lacuna with rhetoric. Taiheiyo, however, does itself no service to say that it "borders on farcical" to analogize section 354.6 to other "traditional exercise[s] of the state's police power." (Opp. at 23.) The first opinion of the Court of Appeal stated that the statute was precisely such an exercise. (App. 55.)

II. The Decision Below Allows the Executive's Litigation Tactics to Vitiate State Laws.

Taiheiyo attempts to avoid the grave separation of powers and federalism concerns raised by the Court of Appeal's holding by pretending they don't exist. But ignoring the court's dangerous misreading of *Garamendi* does not make the problem go away. As explained above, the 1951 Treaty does not expressly or impliedly preempt claims by non-signatory nationals like Mr. Jeong. For this reason, Taiheiyo is really asking this Court to uphold preemption of a State law based solely on the Executive Branch's statement of policy in the context of this litigation. Indeed, Taiheiyo is asking this Court to sweep aside a law passed by the California Legislature based on the *latest* statement of policy from the Executive.

But reading *Garamendi* to compel such deference to the Executive Branch in the interpretation of the "policy" behind a treaty undermines both separation of powers and federalism principles. Uncritical deference to the Executive as to a policy embodied in a Treaty essentially removes the Senate's ability under Article II to act as a check on the Executive's treaty-making power. Instead, the Senate's advice and consent would become a mere formality after which the Executive would have complete control over the "policy" embodied in the treaty no matter what was actually contained in the treaty.

Undermining the Senate's power to review the executive's treaties also removes a crucial protection for the autonomy of the States. The "principal means chosen by the Framers to preserve the States in the constitutional system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469

U.S. 528, 550 (1985). The Framers gave the States a central role in choosing representatives in each house of the legislature, especially the Senate. *Id.* at 551. By transferring the absolute authority to interpret a treaty's policy to the Executive, without first determining that this policy is "expressed unmistakably" in that treaty, the Court of Appeal undercuts this fundamental constitutional structure by allocating the power to preempt state law to the Executive alone free from the political checks and balances provided by the Senate.

III. Earlier Cases Do Not Definitively Resolve the Important Issues Presented.

Taiheiyo argues that "the petition should be denied because there is no conflict to resolve." (Opp. at 12 (type case changed).) One of its two cases is off point; the second deals with the issues in only a glancing fashion. The cases underscore that the Court should grant certiorari, so that the important issues presented can be definitively addressed.

In *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003), the treatment of the issues of non-signatory nationals was both cursory and incorrect. *Deutsch* was a consolidated MDL case that involved American POW's, people enslaved by German companies, and civilians enslaved by Japanese companies. *Deutsch* relegated its discussion of the latter to a footnote:

> It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a

> war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

Id. at 714 n.14. We know what the United States' "resolution" was for *signatory* nationals – their claims were waived. *See Mitsubishi Maters. Corp. v. Superior Court (Dillman)*, 113 Cal. App. 4th 55, 79, 6 Cal. Rptr. 3d 159, 178 (2003) ("[t]he 1951 treaty is express in not allowing" claims of U.S. nationals). The *Deutsch* court's assertion, however, does not elucidate the question of what the "resolution" was for *non-signatory* nationals. The lack of a reasoned analysis makes this aspect of the decision of little applicability. Moreover, *Deutsch* was decided before *Garamendi*, and so does not use its approach.

The second case, *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), *vacated*, 124 S. Ct. 2835 (2004), was against the Government of Japan, which was "entitled to [sovereign] immunity." *Id.* at 680. The respondents here are private companies. In any event, the judgment in *Hwang Geum Joo* has been vacated, and the case is now under reconsideration.

IV. Taiheiyo's "Alternative Grounds" Are of No Merit.

Taiheiyo raises, as "alternative grounds" two issues that were not treated in the Court of Appeal's opinion under review, but which were correctly decided *against* Taiheiyo in the court's first opinion (*see* Opp. at 25 n.12, 26 n.13).

A. Political question.

Taiheiyo submits that cases involving foreign relations are "'not subject to judicial inquiry or decision.'" (Opp. at 24 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918))). This "sweeping statement[]" notwithstanding, however, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). [1]

Deutsch, indeed, recognized that "[t]he problem with this argument is that it makes every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs." 324 F.3d at 713. Courts "cannot shirk" the "responsibility" to "construe treaties and executive agreements" "merely because our decision may have significant political overtones." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

Moreover, this is "an ordinary tort suit," and the department to which it is "'constitutionally committed' is none other than our own – the Judiciary." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991). "This factor alone . . . strongly suggests that the political question doctrine does not apply." *Id.* [2]

---

[1] Although Taiheiyo asserts that the political question doctrine "is binding" on state courts (Opp. at 24), the political question doctrine derives from the limits Article III imposes on *federal* courts. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984).

[2] In the German litigation (*see* Opp. at 25), the courts viewed themselves as asked to "to structure a reparations scheme." *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284 (D.N.J. 1999); *see also Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999). (*But*

(Continued on following page)

B. Due Process.

Section 354.6 allows a forum for California residents to bring claims for unpaid labor and personal injury against corporations doing business in California. This does not offend due process.

Taiheiyo claims that "[a]pplying California law would be arbitrary and unfair." (Opp. at 26). It is not, however, "'arbitrary or unfair'" to apply the forum State's statute of limitations, even where the underlying claims "are and must be governed by the law of a different State." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730, 722 (1988). Remedies are also "generally regarded as with the forum State's legislative jurisdiction." *Id.* at 728. Section 354.6 does not even provide the substantive rules of decision; these would be selected under California choice of law rules.

This is a personal lawsuit for compensation by a California resident against companies doing business in California. *Cf. Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) (involving the

---

see, e.g., The Paquete Habana, 175 U.S. 677 (1900) (awarding damages to Spaniards whose vessels were unlawfully seized by the U.S. during war).) That is not what Mr. Jeong seeks. Moreover, while the appeals in those cases were pending, they and other German slave labor claims were resolved in connection with the creation of a $5 billion foundation.

Kelberine v. Société Internationale, Etc., 363 F.2d 989, 995 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 989 (1966), held that a case seeking damages to all who had suffered at the hands of the Nazis was "too vague," "too indefinite," and "too complicated." *See also Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 694-95 (N.D. Cal. 2003) ("plaintiffs . . . seek . . . the undetermined value of property stolen in untold ways in a multiplicity of regions by both military personnel and civilians"). Mr. Jeong alleges specific wrongs by a single corporation during a limited time.

"extremely narrow" issue of the validity of a subpoena served by a state insurance commissioner, not the procedural rules for a state's courts, where no Florida insured was a party).

Nor has Taiheiyo identified any conflicting law – law that *denies* compensation for labor and personal injury. Absent such conflict, "there can be no injury in applying [California] law." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 816 (1985). In any event, California has a sufficient aggregation of contacts – for example, Mr. Jeong lives in California, and Taiheiyo is alleged to do business there – to ensure that application of its law is not arbitrary. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313-19 (1981). And the California Legislature found that California has "a moral and public policy interest in assuring that its residents and citizens have a reasonable opportunity to claim their entitlement to compensation." 1999 Cal. Stat. ch. 216, § 1 (App. 132-33).

There is no constitutional warrant to displace the California Legislature's determination that Mr. Jeong's claims can be adjudicated in California.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
FLEISHMAN & FISHER
1875 Century Park East,
Suite 2130
Los Angeles, CA 90067
(310) 557-1077

JULIAN G. KU
HOFSTRA UNIVERSITY
SCHOOL OF LAW
Hempstead, NY 11549
(516) 463-4237

ELIZABETH J. CABRASER
BILL LANN LEE
MORRIS A. RATNER
SCOTT P. NEALEY
LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
275 Battery St., 30th Floor
San Francisco, CA 94111
(415) 956-1000

HAEWON SHIN
LAW OFFICES
OF HAEWON SHIN
3435 Wilshire Blvd.,
Suite 2230
Los Angeles, CA 90010
(213) 385-3773

Michael D. Hausfeld
Agnieszka M. Fryszman
COHEN MILSTEIN,
HAUSFELD & TOLL
1100 New York Ave., N.W.
West Tower, Suite 500
Washington, DC 20005
(202) 408-4600

KENNETH T. HAAN
KENNETH T. HAAN &
ASSOCIATES
3699 Wilshire Blvd.,
Suite 860
Los Angeles, CA 90010
(213) 639-2900

CHRISTOPHER KIM
LISA J. YANG
LIM, RUGER & KIM, LLP
1055 West Seventh St.,
Suite 2800
Los Angeles, CA 90017
(213) 955-9500

DAVID R. MARKHAM
BLUMENTHAL & MARKHAM
2255 Calle Clara
La Jolla, CA 92037
(858) 551-1232

Counsel for Petitioner Jae Won Jeong

Dated: December 2004